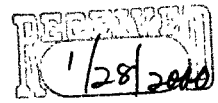


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00-AP-A

January 23, 2000

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

I have written to call to your attention three technical errors which appear in the Federal Rules of Appellate Procedure at Rule 26 (Computing and Extending Time) and at Rule 45 (Clerk's Duties), as amended by the Supreme Court Order of April 24, 1998, which took effect on December 1, 1998.

First, the lists of legal holidays in Rule 26(a)(4) and in Rule 45(a)(2) erroneously substitute "Presidents' Day" for "Washington's Birthday". According to Title 5, U.S.C. § 6103(a), "Washington's Birthday" is the official designation for the legal public holiday commemorated on "the third Monday in February".

Second, Rule 26(a)(4) and Rule 45(a)(2) misname the legal holiday commemorated on the third Monday in January as "Martin Luther King, Jr.'s Birthday". Title 5, U.S.C. § 6103(a) designates that holiday as "Birthday of Martin Luther King, Jr." Finally, Rules 26 and 45 erroneously include an apostrophe in "Veterans Day"; the official designation does not have one.

I request that the appropriate entity within the Judicial Conference (possibly the Advisory Committee on Appellate Rules) please investigate my claim and order the necessary technical corrections to Rules 26 and 45 at the next revision.

Please feel free to contact me at (510) 664-0786 or at the above e-mail address for more information.

Sincerely yours,

Jason A. Bezis
Student, Boalt Hall School of Law,
University of California at Berkeley

Enclosures

vide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner—meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence

Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

The provisions of this rule are based upon FRCP 6(a), (b) and (c) [rule 6(a), (b) and (c), Federal Rules of Civil Procedure]. See also Supreme Court Rule 34 and FRCrP 45 [rule 45, Federal Rules of Criminal Procedure]. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect *ex parte*, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

1971 Amendments

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C. § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be

observed on the first Monday in May and rather than, November 11, on the second Monday of the month. Independence Day is to be observed on the first Monday in September.

The Birthday of Martin Luther King, Jr. is to be observed on the third Monday in January. Rule 26(c) is amended to read:

The proposed amendment to Rule 26(c) is: "The court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law."

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Rule 26.1

(a) Who must file a statement of the parties' positions on the issues presented by the appeal and listing a copy of the statement with the court and the parties to the appeal or more of the

APPELLATE PROCEDURE

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). The first three sentences describe a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a) [rule 25(a), Federal Rules of Civil Procedure]. The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b) [rule 73(b), Federal Rules of Civil Procedure], which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 *Cyclopedia of Federal Procedure* (3d Ed.) § 63.21. The states commonly make special provision for the even of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev. Rules 1:3-3; New York Civil Practice Law and Rules, § 1022; Wisconsin Statutes Ann. 274.01(2). The Provision in the proposed rule is derived from California Code of Civil Procedure, § 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) [rule 25(d), Federal Rules of Civil Procedure] and Supreme Court Rule 48, with appropriate changes.

1986 Amendment

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party

If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General. (As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

Rule 45. Clerk's Duties

(a) General Provisions.

(1) Qualifications. The circuit clerk must take the oath and post any bond required by law. Nei-

ther the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) Records.

(1) The Docket. The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) Calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) Other Records. The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY

The duties imposed upon this rule are those imposed of the circuits. The second sentence of the rule authorizing the closing of the national legal holidays for the district court clerk 77(c), Federal Rules of [rule 56, Federal Rules

The amendment adds holidays. See the Note Rule 26(a).

The amendment to appeals to maintain continues to believe that the Administrative Office of the United States Courts ought to have the format of this docket from manual to automation to technological improvement.

The amendments to substantive change is Luther King, Jr. has holidays.

Rule 46. Attorney

(a) Admission to

(1) Eligibility. Admission to the bar of an attorney is of good character and is admitted to the Court of the United States, another United States district court for Guam and the Virgin Islands.

(2) Application. Application for admission to the court that contains a statement showing the applicant must submit an affirmation:

"I, _____, [my firm] that I am and counselor in law; and I am not a member of the United States bar."

(3) Admission. Motion of a member to act on the application by oral motion in court orders of the court appear before the

Complete Annotation Materials, see Title 28 U.S.C.

generally, see C.J.S. United States
ion of hours of service, see C.J.S.
eq., 1197 et seq.

RESEARCH

ation pages of this volume.

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o be consecutive when he deter.
that agency would be seriously
apped in carrying out its functions
the costs would be substantially
ed. *Acuna v. U.S.*, Ct.Cl.1973,
2d 1356, 202 Ct.Cl. 206, certioran
94 S.Ct. 1608, 416 U.S. 905, 401
d 109.

onal Weather Service (NWS) could
chedule its employees from premi-
y shifts solely because of occur-
of holidays where NWS had not
determination that holiday sensi-
heduling was necessary to reduce
rtial costs or preserve agency's
n. *Gahagan v. U.S.*, Ct.Cl.1989, 19
168.

negotiability of workweek

eral Labor Relations Council's deci-
rat days includable in work week
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etween Department of Agriculture
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outer limits of direction to *Secre-*
National Broiler Council, Inc. v.
al Labor Relations Council, D.C.Va.
382 F.Supp. 322.

, § 7(a), Aug. 19, 1972, 86

TORY NOTES

er the 90th day after Aug. 19, 1972
ction 15(a) of Pub.L. 92-392, set out
Effective Dates of 1972 Acts note
section 5341 of this title.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.

Birthday of Martin Luther King, Jr., the third Monday in
January.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Independence Day, July 4.

Labor Day, the first Monday in September.

Columbus Day, the second Monday in October.

Veterans Day, November 11.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

(b) For the purpose of statutes relating to pay and leave of employ-
ees, with respect to a legal public holiday and any other day declared
to be a holiday by Federal statute or Executive order, the following
rules apply:

(1) Instead of a holiday that occurs on a Saturday, the Friday
immediately before is a legal public holiday for—

(A) employees whose basic workweek is Monday through
Friday; and

(B) the purpose of section 6309 of this title.

(2) Instead of a holiday that occurs on a regular weekly
nonworkday of an employee whose basic workweek is other than
Monday through Friday, except the regular weekly nonworkday
administratively scheduled for the employee instead of Sunday,
the workday immediately before that regular weekly nonworkday
is a legal public holiday for the employee.

This subsection, except subparagraph (B) of paragraph (1), does not
apply to an employee whose basic workweek is Monday through
Saturday.

(c) January 20 of each fourth year after 1965, Inauguration Day, is
a legal public holiday for the purpose of statutes relating to pay and
leave of employees as defined by section 2105 of this title and
individuals employed by the government of the District of Columbia
employed in the District of Columbia, Montgomery and Prince Geor-
ges Counties in Maryland, Arlington and Fairfax Counties in Virginia,
and the cities of Alexandria and Falls Church in Virginia. When

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

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MILTON I. SHADUR
EVIDENCE RULES

February 25, 2000

Mr. Jason A. Bezis
2100 Channing Way, #408
Berkeley, California 94704

Dear Mr. Bezis:

Thank you for your suggestion to amend Appellate Rules 26 and 45. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Appellate Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Honorable Will L. Garwood
Professor Patrick J. Schiltz